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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 MYUNG-HEE MULLER,

11 Plaintiff,

NO. 14-cv-05743-RJB

12 vs.

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14 CITY OF TACOMA, a municipal
corporation; LISA RICHARDSON and
15 DOES 1-10, inclusive,

16 Defendants.

ORDER ON DEFENDANTS' MOTION
TO COMPEL DISCOVERY
RESPONSES AND FOR
EXAMINATION OF PLAINTIFF
PURSUANT TO FRCP 35

18 THIS MATTER comes before the Court on Defendants' motion (1) to compel
19 discovery concerning economic damages and (2) for an independent examination of Plaintiff.
20 Dkt. 18. The Court has considered the motion, Plaintiff's responses (Dkt. 20, 21), Defendants'
21 reply (Dkt. 24), and the remainder of the file therein.

22 I. Background

23 Plaintiff, a Senior Accountant with the City of Tacoma from 2007 to 2013, asserts
24 claims for wrongful termination, gender discrimination, racial discrimination, retaliation,
25 violations of privacy and due process, false light, and negligent retention and supervision.

1 Dkt. 1. Plaintiff seeks damages for loss of wages, damage to reputation and character, and
 2 emotional distress. Dkt. 9, at 5.

3 II. Motion to Compel Discovery (“Discovery Motion”)

4 Defendants argue that, although Plaintiff provided Defendants with tax returns in
 5 response to Defendants’ request for production, Defendants are entitled to more discovery
 6 concerning Plaintiff’s alleged economic damages. Dkt. 18, at 9-11. *See Request For*
 7 *Production #15.* Dkt. 19, at 6-10. Furthermore, Defendants contend, Plaintiffs have not
 8 sufficiently responded to their request interrogatory concerning economic damages, which
 9 includes a request for a precise computation of damages. Dkt. 18, at 9-11. *See Plaintiff’s*
 10 *Response to Interrogatory #21,* Dkt. 19, at 6-10.

11 Plaintiff opines that, in the first instance, Defendants have not observed their meet and
 12 confer obligations precedent to filing the Discovery Motion. Dkt. 21, at 2. *C.f.* Dkt. 19, at 3, 4.
 13 Plaintiff also argues that Defendants have not demonstrated how the tax returns provided were
 14 unresponsive or insufficient to the request for production, and that the interrogatory regarding
 15 economic damages is objectionable because it is vague and imprecise. *Id.*

16 Under Fed. R. Civ. P. 26(a)(1)(A)(iii), initial disclosures must include:

17 a *computation* of each category of damages claimed by the disclosing party—who
 18 must also make available for inspection and copying as under Rule 34 the documents
 19 or other evidentiary material . . . on which each computation is based, including
 20 materials bearing on the nature and extent of injuries suffered. Fed. R. Civ. P.
 26(a)(1)(A)(iii) (emphasis added).

21 In this case, under the facts presented, Plaintiff’s discovery efforts thus far are
 22 inadequate. First, given that Plaintiff has only provided tax returns in response to Defendants’
 23 request for production concerning economic damages, Plaintiff’s response is insufficient.
 24 Although the Court has not reviewed the tax returns Plaintiff provided as discovery, they
 25 presumably lack financial information germane to calculating any other damages other than
 26 loss of wages. Tellingly, Plaintiff does not argue that the tax returns are relevant to calculating

1 damages of Plaintiff's reputation and character or emotional distress, two categories of
2 damages Plaintiff specifically designated in the initial disclosure. *See* Dkt. 21.
3

4 Second, concerning the interrogatories, Plaintiff's response to date is insufficient.
5 Interrogatory No. 21 specifically requested an amount of damages (Dkt. 19, at 6-10), and
6 under Fed. R. Civ. P. 26(a)(1)(A)(iii) Defendants are entitled to a "computation" of damages,
7 which is a numerical response. Listing categories of damages is insufficient. *See* Fed. R. Civ.
8 P. 26(a)(1)(A)(iii). While Plaintiff opines that Defendants' interrogatory is vague, it is
9 Plaintiff, not Defendants, who submitted the damages categories, so Plaintiff is obliged to
10 offer their computation. Furthermore, whether or not counsel for Plaintiff and Defendants had
11 a formal meet and confer under Fed. R. Civ. P. 37(a) is immaterial to Plaintiff's good faith
12 obligation to respond to what is, in this Court's view, a reasonable discovery request. In fact,
13 in the spirit of Fed. R. Civ. P. 37(a), Defendants went beyond their initial discovery requests
14 and corresponded with Plaintiff. *See* Dkt. 19, at 24, 25. In summary, Defendants' Discovery
15 Motion should be granted. Plaintiff should provide an exact computation for each category of
16 economic damages previously disclosed, as well as documentation relevant to their
17 computation.

18 III. Motion to Examine Plaintiff ("Rule 35 Motion")
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20 Defendants request that the Court order Plaintiff to submit to Defendants' independent
21 examination by Dr. Elizabeth Ziegler pursuant to Fed. R. Civ. P. 35(a). Plaintiff has placed
22 her mental state in controversy, Defendants contend, because Plaintiff alleges: that
23 Defendants' actions caused her psychological harm; that Plaintiff had never needed
24 psychological treatment previously; that Plaintiff still suffers from anxiety attacks; that
25 Plaintiff still shows physical symptoms of her psychological condition, including stomach and
26 digestive problems. Dkt. 18, at 6, 7. Furthermore, according to Defendants, there is "good
cause" for an independent examination, because Plaintiff has alleged an ongoing mental

1 injury and the examination is needed for Defendants to have a fair opportunity to defend
 2 against Plaintiff's claims.

3 Plaintiff takes issue with Defendants' Rule 35 Motion firstly on the basis that Plaintiff
 4 cannot make the requisite "good cause" showing, because Plaintiff's emotional distress is of
 5 the "garden variety" type. Dkt. 20, at 2, 3. According to Plaintiff, Defendants' Rule 35 Motion
 6 and the proposed order fail for vagueness, because they do not specify the 'time, place, and
 7 manner,' and the request as proposed would give Defendants *carte blanche* for invasive
 8 testing and examination. *Id.*

9 Defendants' reply briefing addresses Plaintiff's time, place, and manner argument by
 10 submission of a revised draft order, which proposes an examination of Plaintiff by Dr. Ziegler
 11 on July 2, 2015 at 9:00am at the 42nd floor of Two Union Square in Seattle, Washington. Dkt.
 12 24, at 4.

13 Under Fed. R. Civ. P. 35(a), when a party's mental or physical is in controversy,
 14 courts may order the party's examination by a suitably licensed or certified examiner. Fed. R.
 15 Civ. P. 35(a). Courts ordering a party's examination must find good cause and specify the
 16 time, place, manner, conditions, and scope of the examination, as well as the person who will
 17 perform it. *Id.* Because of the intrusive nature of examinations, they are not granted as a
 18 matter of right, but rather as a matter of discretion. *See id.* E.g., *Coca-Cola Bottling Co. v.*
 19 *Negron Torres*, 255 F.2d 149 (1st Cir. 1958). Courts must make fact-specific inquiries, and no
 20 one factor is dispositive, even in cases with allegations of emotional or psychiatric harm. *C.f.*
 21 *Duncan v. Upjohn Co.*, 155 F.R.D. 23 (D.Conn. 1994) (plaintiff in negligence suit put mental
 22 condition in controversy by claiming ongoing psychiatric harm); *Bridges v. Eastman Kodak*
 23 *Co.*, 850 F.Supp. 216 (S.D.N.Y. 1994) (plaintiff's mental health not in controversy where
 24 plaintiff did not allege mental distress as a separate tort claim).

25 In this case, Plaintiff's mental, physical, and emotional health is in controversy and
 26 there is good cause for Defendants' independent examination. Plaintiff alleges damages from

emotional distress from psychological and physical problems that, according to Plaintiff, continue to this day. Dkt. 19, at 10. Plaintiff also represents that she never had psychological treatment prior to “being under siege” by City of Tacoma employees. *Id.* She has visited both a general medicine practitioner, Dr. Wilson, and a psychologist, Dr. Teachout. *Id.* On these facts, an independent examination by Defendants is warranted.

Based on the parties' correspondence, it appears that Plaintiff at least preliminarily agreed to an examination by Dr. Elizabeth Ziegler, neuropsychologist, but that Plaintiff took issue with Defendants' lack of specificity as to which psychological tests Dr. Ziegler would employ and to the "necessity" of any examination in the first place. Dkt. 19, at 12-14. While certainly subjecting Plaintiff to non-standardized, lengthy tests is possible, it is plain to this Court that that is not Dr. Ziegler's intent. *Id.*, at 16. Dr. Ziegler should be accorded the professional courtesy to conduct a complete examination, which means she is given latitude to employ standard tests that she deems helpful to her independent evaluation. To rule otherwise would undermine Dr. Ziegler's ability to do her job and Defendants' opportunity to gather evidence in preparation for trial. Moreover, Dr. Ziegler's examination will be time-limited, *see supra*, so her opportunity to conduct tests is not unlimited. Defendants' Rule 35 Motion for an independent examination of Plaintiff should be granted.

* * *

ACCORDINGLY, Defendants' motion (Dkt. 18) is **GRANTED**. It is hereby
ORDERED that:

1. Plaintiff must provide numerical calculations for and documents relevant to each category of economic damages Plaintiff previously disclosed within 10 days of the issuance of this Order;
2. Defendants may conduct an independent examination of Plaintiff with Dr. Elizabeth Ziegler on July 2, 2015 at 9:00am, 42nd Floor of Two Union Square in Seattle, Washington. If Plaintiff is not available on that date, Plaintiff must make alternate arrangements agreeable to Defendants.

3. Any psychological testing conducted by Dr. Ziegler of Plaintiff shall be limited to standard psychological tests that Defendants reasonably anticipate could be admissible under *Frye*.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 18th day of June, 2015.

Robert J. Bryan

ROBERT J. BRYAN
United States District Judge